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No. 86-1251

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ASSOCIATED FILM DISTRIBUTION CORPORATION, AVCO EMBASSY PICTURES CORP., BUENA VISTA DISTRIBUTION CO., INC., COLUMBIA PICTURES INDUSTRIES, INC., FILMWAYS PICTURES, INC., METRO-GOLDWYN-MAYER, INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL PICTURES DIVISION OF UNIVERSAL CITY STUDIOS, INC., UNIVERSAL FILM EXCHANGES, WARNER BROS. INC., and WARNER BROS. DISTRIBUTING CORPORATION,

Petitioners,

—v.—

THE HONORABLE DICK THORNBURGH and THE HONORABLE HARVEY BARTLE, III, BUDCO THEATRES, INC., BUDCO QUALITY THEATRES, INC., and FOX THEATRES MANAGEMENT CORP.,

Respondents.

BRIEF FOR RESPONDENT FOX THEATRES MANAGEMENT CORP. IN OPPOSITON

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Should this Court grant the petition for certiorari where: (1) the Court of Appeals unanimously affirmed the trial court's uncontroverted factual findings that the Pennsylvania Feature Motion Picture Fair Business Practices Law ("the Act") is not preempted by the Supremacy Clause because it does not deprive petitioners of any ownership interests or protections afforded them by the Federal Copyright Act; (2) the Court of Appeals decision mirrors the Sixth Circuit's ruling that a substantially identical Ohio statute is constitutional despite the same copyright challenge brought by the same petitioners, *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982); and (3) the Court of Appeals decision follows well established precedents of this Court which have determined that Congress did not intend to preempt all state regulations affecting the sale and marketing of copyrightable products?

2. Should this Court grant the petition for certiorari where: (1) the Court of Appeals affirmed the trial court's uncontroverted factual findings that the Act does not violate the First Amendment because it is content-neutral regulation of commercial activity which is not directed against speech and furthers substantial state interests; and (2) the Court of Appeals decision is consistent with this Court's holding in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), because the Act does not threaten to suppress petitioners' ability to communicate speech effectively to the Pennsylvania public?

PARTIES TO THE PROCEEDING

Fox Theatres Management Corporation, a privately-owned Pennsylvania corporation, states that it has no parent, subsidiary or affiliated companies.

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Respondents.

BRIEF FOR RESPONDENT FOX THEATRES MANAGEMENT CORP. IN OPPOSITON

The instant Petition fails to present any "special and important" reason warranting the issuance of a writ of certiorari. (*See* Sup. Ct. Rule 17). The copyright challenge advanced by petitioners was properly rejected by the Court of Appeals, as well as the Sixth Circuit in *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), in conformity with a long line of decisions by this Court upholding the right of states to

regulate the sale and marketing of copyrighted works. *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984); *Watson v. Buck*, 313 U.S. 387 (1941); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932).

Nor is there any substance to petitioners' attempt to manufacture a conflict between the Court of Appeals' rejection of their First Amendment claims and the holding in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). This Court's decisions both before and after *Minneapolis Star* demonstrate that state legislation which regulates only the motion picture industry does not contravene the First Amendment where, as here, it does not threaten to or suppress speech and furthers substantial state interests. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986). Because there is no dispute that the courts below properly applied *United States v. O'Brien*, 391 U.S. 367 (1968), in upholding the constitutionality of the Act, petitioners' only argument is that the Act should be judged under the "compelling" standard of *Minneapolis Star*. It is clear, however, from decisions of this Court after *Minneapolis Star*, that absent special circumstances, not present here, *O'Brien* remains the valid test for determining the constitutionality of state legislation like the Act. *City of Renton*; *Wayte v. United States*, 470 U.S. 598 (1985).

Finally, far from being any conflict among lower federal courts, there has been unanimity in upholding the constitutionality of similar state anti-blind bidding legislation. *See Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in relevant part, remanded on limited issues*, 679 F.2d 646 (6th Cir. 1982); *Warner Bros. Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *remanded on other grounds*, 782 F.2d 136 (10th Cir. 1985). This uniformity not only demonstrates the correctness of the Third Circuit's decision, but also makes this Court's exercise of certiorari jurisdiction completely unnecessary.

COUNTERSTATEMENT OF THE CASE

In 1980, the Pennsylvania Legislature passed the Act to correct specific practices in the motion picture distribution business which "vitally affect" the state's general economy as well as the public's access to "works of artistic expression and opinion." Pa. Stat. Ann. tit. 73, § 203-2 (Purdon Supp. 1985). After extensive committee meetings, testimony, debate and review of written material, including detailed information submitted by petitioners, the Legislature concluded that the public interest would be promoted by eliminating certain fraudulent, anticompetitive and abusive practices in motion picture distribution.

Prior to the Act, petitioners "blind bid" most motion pictures; *i.e.*, requiring exhibitors to license films, often a year before their actual release, without first permitting the exhibitor to see the picture and judge its potential profitability and suitability for his particular theatre. (A 93, 100). Moreover, in order to license a film petitioners often charged exhibitors a guarantee, a non-refundable fixed dollar amount which petitioners collected regardless of what the film actually grossed at the box office. (A 106-08). Petitioners also required that exhibitors post advances, which like guarantees involved a substantial amount of up-front dollars paid to petitioners for the rights to license their films. *Id.* When films were licensed before the Act, petitioners would frequently grant exclusive, long-running licenses to selected theatres, thereby preventing the wider distribution of the movie to the general Pennsylvania public. (A 95-96). Many of these licenses were not awarded based on open bidding among exhibitors, but were the result of closed door negotiations between petitioners and a few select exhibitors. (A 111). Against this background, the Pennsylvania Legislature passed the Act which prohibits blind bidding, *i.e.*, licensing films without a trade screening, prohibits the payment of guarantees and advances in film licensing, requires

that distributors make films available for expanded runs after 42 days, and requires open bidding in the licensing of motion pictures.

Shortly after passage of the Act, the distributors filed a broad based complaint alleging that the Act violated the Commerce Clause and the First Amendment and was pre-empted by the Copyright Act and the Supremacy Clause. This was not the first time that these same distributors attacked the validity of similar state anti-blind bidding legislation. Yet, each time the courts have upheld the constitutionality of these statutes.[1] Petitioners in the present action moved for summary judgment before discovery had commenced. The district court's grant of petitioner's motion (A 18) was reversed by the Third Circuit, which held that the Act on its face neither violated the First Amendment nor was preempted by the Copyright Act and the Supremacy Clause. (A 70).

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1 In Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980) *aff'd in relevant part, remanded on limited issues*, 679 F.2d 656 (6th Cir. 1982), after a four-week trial, the district court found that the Ohio anti-blind bidding statute, similar in virtually all respects to the Act in Pennsylvania, was constitutional. The Ohio district court "searched in vain for [constitutional] rights that have been thus transgressed," *Allied Artists*, 496 F. Supp. at 452, and concluded that the alleged burdens of the Act were "incidental restriction[s] on expression. . . outweighed by the state's interests." *Id.* at 435. The Sixth Circuit agreed, holding that the statute "is content-neutral under the [F]irst [A]mendment", 679 F.2d at 661, and that there is no authority "for [petitioners'] argument that state trade regulation which affects distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act." *Id.* at 663. In Warner Bros., Inc. v. Wilkinson, 533 F. Supp. 105 (D. Utah 1981), *remanded on other grounds*, 782 F.2d 136 (10th Cir. 1985), the court granted summary judgment for defendant, rejecting plaintiff's claim that a provision of the Utah Motion Picture Fair Bidding Act which prohibited guarantees unconstitutionally burdened interstate commerce or was preempted by the Federal Copyright Act. And in Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250 (1982), the Georgia Supreme Court rejected plaintiff's constitutional challenge to a "blind bidding" statute, and held, relying on federal authorities, that it violated neither the free speech nor the due process clause of the state constitution.

With respect to petitioners' Copyright Act and Supremacy Clause claims, the Court of Appeals adopted the framework of analysis set forth by the Ohio district court and the Sixth Circuit in *Allied Artists*. (A 88). The court concluded that the Act does not create, grant or destroy any rights that are "equivalent" to the exclusive rights of copyright found in the Copyright Act. (A 83, n.11). Moreover, the Act "on its face contains no threat to the copyrights themselves." (A 87). The only issue remaining for the district court was the factual question:

> "Whether the prohibitions contained in the Pennsylvania Act, *in fact*, 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (A 86) (citation omitted; emphasis in original).

Similarly, with respect to the First Amendment claim, the Court of Appeals held that the Act is content-neutral trade practice legislation which "does not directly affect speech." (A 75). Adopting, once again, the legal framework of the district court and Sixth Circuit in *Allied Artists* the court determined that the correct legal standard to be applied in evaluating whether the Act violates the First Amendment is the balancing test established in *United States v. O'Brien*, 391 U.S. 367 (1968). (A 77-79). Having settled the legal question, the Third Circuit remanded the case for the district court to make just two critical factual determinations:

> "[W]hether the Act *in fact* creates any material risk of delay in exhibition or *in fact* threatens to inhibit the production of motion pictures by changing the financial structure of the industry. . . ." (A 76) (emphasis in original).

After extensive discovery and a six-week trial, the district court found the Act constitutional in all respects. Thus, as to petitioners' Copyright Act and Supremacy Clause claims, the district court found that the Act (1) "has had no effect on the

incentive to make and distribute motion pictures"; (2) "sets no limit on the financial terms at which films may be licensed"; (3) does not "prevent[ ] a distributor from selling a film to a theatre owner outright"; (4) does not "interfere with the distributors' ability to license a film to an exhibitor"; and (5) does not "prevent the distributor from assuring itself of a fixed amount of renumeration for a license." (A 134-35). In short, the trial court held that the Act had "little effect on the essential rights of the copyright owner" (A 135) and that the Act, in practice, "does not stand as an obstacle" to petitioners' exercise of their ownership rights in their copyrights.[2] (A 130).

As for petitioners' First Amendment challenge, the Court held that "the impact of this law on First Amendment freedom is *de minimis* and in any event is outweighed by the interests of the state in passing the statute." (A 126). The district court specifically answered both First Amendment questions posed by the Third Circuit in the negative, expressly finding that (1) the Act "has simply not caused delay in the release of motion pictures" (A 103), and (2) petitioners "abandoned their claim that the Act affects financing for films and presented no evidence on the issue." (A 108, n.16).

The Court of Appeals affirmed the findings and holdings of the district court. Thus, the Court of Appeals upheld the district court's findings that the Act did not interfere with the Federal Copyright Act because it "had no effect on the incentive to make and distribute motion pictures"; did not "dilute the distributors' ownership rights in their films"; set "no limit on the financial terms at which films may be licensed"; did "not restrict the distributors' right to license its films"; and had "not impaired distributors' ability to release their films on the dates they desire." (A 14).

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2 The district court also rejected petitioners' Commerce Clause challenge finding that the Act did not violate the Commerce Clause because it (1) does not discriminate against out-of-state distributors, (2) does not impede the flow of films into Pennsylvania and (3) created "substantial" benefits which outweigh any "minimal" burdens arising from the Act. (A 120).

The Third Circuit rejected petitioners' claim that the Act must fall because its "burdens" are "imposed not by legislation of general application but by a statute aimed solely at the copyright-protected motion picture distributors." (A 15). As the court below held, "the district court conclud[ed] that these burdens were insignificant" and in any event, "[s]ince the burdens to which the [petitioners'] point relate only to the maximization of income we find that their argument in this respect is also foreclosed by our earlier opinion." *Id.*

The Court of Appeals also affirmed the district court's finding that "the Act has had little, if any, impact on the First Amendment activities of the distributors" and, therefore, "in reality is not a discriminatory regulation of a First Amendment activity, but instead, a content-neutral, regulatory statute that may have an incidental effect on some of the distributors' First Amendment activities." (A 11). Accordingly, the court below rejected petitioners' argument that the Act must meet the "compelling" state interest test set forth in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Rather it agreed with the district court that the "substantial" government interest test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), provided the proper framework within which to judge the Act. As the Court of Appeals held:

> "An essential factor in the *Minneapolis Star* analysis is the inference of a goal to suppress expression. In our prior opinion in this case, we found that the Pennsylvania Act was not infected by such a goal. We stated that the Act was 'clearly content-neutral', 'trade practice legislation', and that it was directed at the motion picture industry 'not because the that industry communicates ideas, but rather because . . . the market structure of that industry is unique.' 683 F.2d at 812 (quoting *Allied Artists*. . . .). This conclusion that the Act was prompted by trade practices associated with the distribution of motion pictures forecloses the argument that the Act was designed to single out the motion picture industry

> in order to suppress its expressive conduct. It is only the latter type of differential treatment that triggers the 'compelling interest' analysis of *Minneapolis Star*." (A 10).

Petitioners' request for a rehearing was denied without opinion. Although petitioners contend that the five judges who voted for rehearing "had sufficient doubts about the result" of the case below (Petition at 6), it is clear that their concern was directed only at the 42-day clause, not the general provisions of the Act. Judge Sloviter, who authored the opinion for the court below, carefully carved out the 42-day clause from the rest of the Act when she questioned whether, on this narrow issue, a preemption argument might be worth a second look.

As the Judge explained:

> "There may be merit to the distributors' argument that the 42-day provision, when construed as limiting the distributors' right to license an exclusive run to 42 days, is preempted by the Copyright Act. However, such preemption would be apparent on the face of the statute, and cannot be reconciled with the court's earlier decision that the Act is not facially invalid under the Copyright Act. As we have stated above, we are bound to the position." (A 17).
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> * * *
>
> "[I] feel[ ] compelled to join [my] colleagues in affirming the district court decision because Internal Operating Procedure 8C of this court binds subsequent panels to reported panel opinions. Court *in banc* consideration is required to overrule a published opinion." (A 17 n.3).

Given Judge Sloviter's opinion about reconsidering the Third Circuit's earlier ruling on 42-day clause, it is certainly not surprising, albeit no reason to grant certiorari, that she and four other judges wanted to reopen that narrow issue for the entire court to review.

REASONS FOR DENYING THE WRIT

I.

The Courts Below Correctly Decided That, Based Upon Established Precedent Of This Court, The Act Is Not Preempted By The Supremacy Clause Because It Does Not Deprive Petitioners Of Any Ownership Interests Or Protections Afforded Them By The Federal Copyright Act

In enacting the Copyright Act, Congress did not intend to preempt legislation like the Act.[3] Although petitioners argue that they were granted an "affirmative" right to distribute their works without interference, it is well recognized that the effect of a copyright is to establish who has the *right* to distribute, to reproduce, etc. as against other people—*i.e.*, who has the "right to prohibit reproduction. . . , performance, distribution or display of such work." 1 M. Nimmer, *Nimmer On Copyright* ("Nimmer"), § 1.01[B], at 1-11; (A 129). Section 301 refers to "exclusive" right because it deals with property interests against others who might want to utilize the same copyright. *See* Nimmer, § 1.01[A]-[B]; A. Latman, *The Copyright Law: Howell's Copyright Law Revised and The 1976 Act* 63-69 (5th ed. 1979). The word "exclusive" has no meaning in regard to state regulation of the use of the copyright; through the Act, Pennsylvania is not trying to obtain a property right to exploit copyrights as against their federal law owners.

As Professor Nimmer explains in the latest edition of his treatise, approving the holding in *Allied Artists*, 496 F. Supp.

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3 The language of Section 301 of the Copyright Act, which governs preemption, and the legislative history of that Section demonstrate that Congress intended to preempt only those state laws that purport to vest ownership of a copyrightable work, *i.e.*, "rights that are equivalent to any of the exclusive rights within the general scope of copyright," and not to preempt state law that regulates the use of that work. 17 U.S.C. § 301(b)(3). *See* Notes of the Committee on the Judiciary, H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5747-48 and cited in (A 129).

at 408, state law is preempted only if it prohibits the naked exercise of the right itself, *i.e.*, the essential feature of ownership. If, however, state law regulates the manner of exploitation, but not the right to exploit itself, then it is not preempted. Nimmer, § 1.01[B], at 1-11-1-12.[4]

Under petitioners' theory, any state statute which in any way limits the copyright owner's ability to make money or regulates the distribution and licensing of copyrighted products is preempted. Petitioners argue that the Copyright Act protects the movie industry from state regulation which in any way impacts on their copyright. The incredible result of this rationale is that any law which impacts the motion picture business—whether a state antitrust law, an antifraud law, a consumer safety law, or otherwise—would be preempted under the Copyright Act since it affects sale and licensing to some degree. The inevitable extension of this thesis is that a copyright holder is free to distribute his work in any fashion he chooses, immune from state regulation.

Yet, well established precedent in this Court flatly contradicts this premise. In *Watson v. Buck*, 313 U.S. 387, 404 (1941), the Court expressly recognized that the copyright laws do not deprive the states of their rights to regulate combinations in restraint of trade in copyrighted materials and rejected claims that the exclusive right granted by Congress to distribute

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4 As both the district court and Professor Nimmer have noted, this distinction is highlighted by section 302(b)(3) as originally drafted:

"(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any state with respect to . . .

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106, including breaches of contract, invasion of privacy, defamation and *deceptive trade practices such as passing off and false representation.*" (A 130, n.30); Nimmer § 1.01[B] at 1-13 (emphasis added).

The elimination of this illustration in the current version of § 301(b)(3) was not intended to substantively change the provision. (A 130, n.3); Nimmer, § 1.01[B], at 1-14.3.

copyrighted material includes the right to distribute it in any manner deemed most desirable by the copyright holder:

> "We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." *Id.*

In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932), the Court also rejected the notion that because "a copyright is property derived from a grant by the United States" it is not subject to state regulation in the manner in which its product is marketed, and accordingly, upheld a state's tax on royalties derived from federal copyrights. There could hardly be a more direct and effective way of reducing an author's financial reward from his copyright. Yet the Court stated:

> "The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter, U.S.C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise, should be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." *Id.* at 127.

Precedents in the Courts of Appeals have produced similar results. For example, in *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 857-58 (3d Cir. 1975) the Third Circuit held that the Lanham Act, providing for federal registration of trademarks, does not preempt a state from regulating the trademark holder's franchise agreement licensing exclusive use of the trade-

mark.[5] *See also C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1162, 1163 (5th Cir. 1977); *Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Commission*, 448 F. Supp. 1237, 1241 (D. Nev. 1978), *aff'd without opinion*, 440 U.S. 941 (1979) (relying on *Mariniello*, regulation sustained against the plaintiffs' Supremacy Clause challenge).

As this Court recently stated, the rights protected by the Copyright Act are "neither unlimited nor primarily designed to provide a special private benefit." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). In discussing the scope of the Copyright Act, the Court in *Sony* rejected an argument similar to the one made by petitioners here:

> "This protection has never accorded the copyright owner complete control over all possible uses of his work. [footnote omitted]. Rather, the Copyright Act grants the copyright holder 'exclusive' rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies." *Id.* at 432-33.[6]

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5 Petitioners attempt to distinguish *Fox Film*, *Watson* and *Mariniello* on the ground that these cases involved state laws of general application, rather than regulations directed at a particular copyrightable product like motion pictures. But this tactic fails because there is no precedent for the distinction between such general laws and laws directed at an industry involving a copyrighted product. If, as distributors contend, the very fact of state regulation so interfered with the copyright owner's exploitation of the copyright as to be preempted, it would hardly matter if this interference were in a statute of general or specific application—the amount of interference or conflict would be the same in either case.

6 As the Court further explained in a footnote:

> "*While the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent. See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-158, 68 S. Ct. 915, 928-929, 92 L.Ed. 1260 (1948) (copyright owners claiming right to tie license of one film to license of another under copyright law);

While petitioners concede, as they must, the right of the state to regulate their industry (Petition at 8), in the very next breath they object to the exercise of that right. However, the district court and the Third Circuit established as a matter of fact and law that the prohibitions contained in the Act do not stand as an obstacle to the accomplishment or execution of petitioners' bundle of rights protected by the Copyright Act. Thus, the Act is not preempted by the Supremacy Clause. *See generally Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 500-02 (1984); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

That fact-bound determination presents no conflict with any decision of this Court or any other Circuit. Indeed, the decision conforms exactly to the Sixth Circuit's holding in *Allied Artists* and follows precisely this Court's precedent in *Watson*, *Fox Film* and *Sony*.[7] Since this Court's extraordinary certiorari jurisdiction is not properly invoked "to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), the Petition should be denied.

Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (1932) (copyright owner claiming copyright renders it immune from state taxation of copyright royalties); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349-351, 28 S.Ct. 725-726, 52 L.Ed. 1086 (1908) (copyright owner claiming that a right to fix resale price of his works within the scope of his copyright); International Business Machines v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936) (patentees claiming right to tie sale of unpatented article to lease of patented device)." *Id.* at 433. (emphasis added).

7 This Court has denied certiorari in a similar copyright preemption case. Morseburg v. Balyon, 621 F.2d 972, 977 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (Court of Appeals upheld a California law requiring the seller of a work of fine art to pay a royalty of the gross sales price to the artist because the Copyright Act did not provide the holder with "a right to transfer the work at all times and at all places free and clear of all claims of others . . . [i]t merely means that the artists has 'the exclusive right to transfer the title for consideration' ").

Finally, and apart from all else, it would be improvident for this Court to grant certiorari to review the only portion of the Act about which the Court of Appeals raised question—the 42-day clause—because this provision is exclusive to the Pennsylvania Act and is not contained in any other state's anti-blind bidding legislation. As such, the issue carries no importance outside of Pennsylvania and is not worthy of certiorari consideration. *Cf. New York v. Ferber*, 458 U.S. 747, 749 (1982). Moreover, any intracircuit skirmishing which might account for the divided *in banc* determination "will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Justice Harlan, *Manning the Dikes*, 13 Record of NYC Bar Ass'n, 541, 552 (1958). *See Kimble v. D.J. McDuffy, Inc.*, 454 U.S. 1110 (1981); *Ratchford v. Gay Lib.*, 434 U.S. 1080 (1978).

II.

The Courts Below Correctly Decided That, Based Upon Established Precedent Of This Court, The Act Is Content-Neutral Trade Regulation And Does Not Violate The First Amendment Solely Because It Is Directed At The Movie Industry.

The Court of Appeals applied the proper legal standard for determining whether the Act violates the First Amendment, holding that the balancing test established in *United States v. O'Brien*, 391 U.S. 367 (1968), controlled the disposition of petitioners' First Amendment claims. (A 8-9). That test is specifically geared to statutes which are not directed at speech, but, *e.g.*, regulate particular abuses in a given industry or circumstance and incidentally affect First Amendment values. The Third Circuit rejected the petitioners' assertion that the Act requires exacting scrutiny under the case law embodying the "compelling" standard of review. That standard is used only when a statute on its face is directed at and regulates content. Here the Court of Appeals affirmed the district

court's factual conclusions "that the Act did not unconstitutionally burden First Amendment values and, in fact, that it furthered interests protected by the First Amendment by requiring wider and more rapid distribution of films." (A 9).

It has long been settled that a state may single out an industry in which there are economic abuses for legislative correction even though it does not treat all businesses alike; and equally so, a state may single out one aspect of a business for regulation. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949); *Nebbia v. New York*, 291 U.S. 502, 521 (1934).

Nor is the regulation any more suspect because the business regulated by the "special legislation" involves the distribution or sale of a First Amendment product. This Court on numerous occasions has expressly upheld "special legislation" directed solely at First Amendment activity and, indeed, the movie industry. For example, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court upheld a Detroit ordinance requiring that theatres showing "adult" motion pictures not be located within a specified proximity to other such regulated establishments. The legislation was not of general application, but rather singled out the movie industry for special treatment.

Similarly, in *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) and *Star v. Preller*, 375 F. Supp. 1093 (D. Md.), *aff'd without opinion*, 419 U.S. 956 (1974), the Court upheld "special legislation" aimed solely at the movie industry against First Amendment challenge. In *Times Film* and *Preller*, the regulations required that all films licensed by the City of Chicago and the State of Maryland be submitted to their respective censor boards for examination and licensing. These regulations were not only directed solely at regulating the motion picture industry but were also directed at content. Yet, they survived Court scrutiny under the First Amendment, with the Court in *Times*

Film specifically noting that while motion pictures are protected by the First Amendment, "[i]t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." 365 U.S. at 48.

Other statutes directed solely at certain practices or industries and incidentally affecting First Amendment values have also been upheld against constitutional challenge. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (reaffirming the lesson of *Young* in upholding a Los Angeles municipal ordinance which absolutely prohibited an *entire* means of distributing political campaign literature—the posting of signs on public property); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) ("special" ordinance prohibiting political advertisements, but allowing other types of public advertising on vehicles of a city transit system, did not violate the First Amendment).

Petitioners' reliance on *Minneapolis Star* to create a new "compelling" standard of review for "special legislation" cases was correctly rejected by the courts below. Although petitioners argue that the Act, like the statute in *Minneapolis Star*, singles out a First Amendment industry for regulation, *Minneapolis Star* is clearly a unique case, providing no precedential value for this Court's First Amendment analysis. *Minneapolis Star* combines two features which have long raised red flags in First Amendment analysis. First, it involves the power to tax differentially, and second, it is a tax directed specifically at newspapers. In protecting "the freedom . . . of the press" specifically provided for in the First Amendment, this Court has viewed taxes directed at the press as inherently suspect as censorship; certainly not an issue here where the Act regulates specific industry abuses and is not directed at speech.

Unlike a regulatory statute—such as the Act—geared to specific problems in a specific industry, a discriminatory tax corrects no abuse; it merely raises revenue—and it often has no justification for being targeted at a specific group or industry

other than to burden improperly those selected. As a result, by definition, it requires close scrutiny. While a general tax also serves no regulatory purpose, when the state imposes a generally applicable tax there is little concern "that a government will destroy a selected group of taxpayers by burden-some taxation if it must impose the same burden on the rest of its constituency." *Minneapolis Star*, 460 U.S. at 585. By contrast, with a specific tax against the press, those political restraints are weakened, and the threat of burdensome taxes can operate "effectively as a censor." *Id.* Compounding the problem, courts "are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Id.* at 589. Accordingly, the Court must employ a strict standard of review to protect against real or potential censorship.

It is readily apparent that the Act, as a "trade practices" law designed to remedy specific problems in a particular industry, is wholly different from the special tax applied to newspapers in *Minneapolis Star*. When contrasted against the threat of a deliberate attempt by government to burden a First Amendment industry through the tool of a special tax with no easily identified justification, non-tax regulations directed at specific problems in a particular industry, such as the Act, do not raise the same concerns. Courts have had little difficulty applying the *O'Brien* standard and weighing the particular burdens as well as the benefits imposed by non-tax legislation which singles out a First Amendment industry for regulation of specific problems. *See, e.g., Young v. American Mini Theatres Inc.*, 427 U.S. at 62-63.

The Court of Appeals highlighted this distinction as follows:

> "Petitioners have not persuaded us that the Act is discriminatory in the same sense as was the differential taxation of the press that was ruled invalid in *Minneapolis Star*. The regulation of trade practices between distributors and exhibitors does not directly impinge upon the expressive aspect of moviemaking activities, as did the state taxation of ink and paper used by the press in

> *Minneapolis Star*. Distribution of protected materials also falls within the ambit of the First Amendment but nothing in the language or structure of the Act suggests that the Pennsylvania legislature intended to suppress or regulate speech through regulation of certain trade practices." (A 10-11).

Minneapolis Star has not had the far-reaching scope that petitioners suggest: it has not replaced *O'Brien* as the standard for review in cases involving "special legislation." (A 11). Numerous cases decided after *Minneapolis Star*, involving regulations directed solely at certain industries or practices and incidentally affecting First Amendment values, have applied the *O'Brien* standard where the statutes were not, as in *Minneapolis Star*, related to taxes or censorship of the press, but rather were regulatory laws designed, as is the Act, to remedy specific problems. *See, e.g., Wayte v. United States*, 470 U.S. 598 (1985) (Government's passive enforcement policy to prosecute only non-registrants for the draft who wrote letters to Selective Service judged constitutional under *O'Brien*).

In fact, this Court just last term relied on *O'Brien* in upholding the constitutionality of a zoning ordinance, which prohibited adult theatres from locating within 1,000 feet of residential zones. *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986). Although the ordinance singled out the motion picture industry for differential treatment—and "treat[ed] theatres that specialize in adult films differently from other kinds of theatres", 106 S. Ct. at 929—the Court did not apply the "compelling" standard of *Minneapolis Star*. Indeed, the case was not even mentioned in the opinion. Instead, the Court ruled that:

> "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech' " *Id.* (emphasis in original; citations omitted).

Petitioners' efforts to create a new legal standard for First Amendment analysis of legislation such as the Act failed because *O'Brien*, not *Minneapolis Star*, is the proper test to judge the constitutionality of the Act.

In sum, not only is there no conflict between *Minneapolis Star* and the lower courts' findings with respect to the First Amendment, but those findings—which alone are sufficient to support the judgment below—were eminently correct.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

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